IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 8336 of 1993

For Approval and Signature:

HON'BLE MR.JUSTICE JAYANT PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

KANAIYALAL BABULAL THAKKAR

Versus

UTPAL COOP HOUSING SOCIETY LTD

Appearance:

1. Special Civil Application No. 8336 of 1993

MR SHAILESH C PARIKH for Petitioner No. 1

MR UR GANDHI for Respondent No. 1-3

CORAM : HON'BLE MR.JUSTICE JAYANT PATEL

Date of decision: 17/09/2003

ORAL JUDGEMENT

The short facts of the case are appear to be that a suit came to be filed against the petitioner by the respondent society for recovery of Rs.2,43,410/-with interest at the rate of 4% p.a. being Lavad suit No.1781/89 before the Registrar, Board of Nominees. It

is the case of the petitioner that the said suit was filed on the basis that the petitioner was the President of the society and he had misappropriated certain material of the society and the society had suffered damages and also loss of material and therefore the amount was sought to be recovered in the said suit. It is the case of the petitioner that after the summons were served advocate was engaged by him, however, for one reason or the other the written statement was not filed and the suit proceeded exparte before the Ld.Nominee and ultimately as per the judgment and award dated 1.4.91 the suit was decreed and award was passed for recovery of Rs.2,43,41.34ps with interest at the rate of 12% on Rs.1,21,715.11ps. It is further the case of the petitioner that the petitioner was not aware about the exparte judgment and award passed by the Ld.Nominee and when the petitioner came to know about the aforesaid judgment and award of the Ld.Nominee on 31.12.1992, immediately appeal was preferred by the petitioner being Appeal No.54/93, but since the judgment and award of the Nominee was dated 1.4.91 the application for condonation of delay was also submitted. As per the petitioner the Ld.tribunal heard the application for condonation of delay and thereafter the order below application for condonation of delay was reserved. However, the petitioner learnt subsequently that the learned tribunal as per order dated 6.8.93 dismissed the appeal. Therefore, under the circumstances, the present petition.

2. In this petition initially when the notice came to be issued on 20.8.93 the stay against the execution was granted on condition of depositing a sum of Rs.25,000/-. It may be stated that prior to the present petition, pending the matter before the tribunal stay was granted on condition of depositing sum of Rs.10,000/- Thereafter on 16.8.94 this court directed the petitioner to further deposit a sum of Rs.15,000/-. It is the case of the petitioner that accordingly the petitioner has deposited a sum of Rs.50,000/- in all pursuant to the interim orders passed in the proceedings before the tribunal as well as before this court. It may also be stated that on 31.8.94 when this court considered the matter for admission nobody had remained present on behalf of respondents though they were served and the court admitted the matter and had confirmed the interim relief. Today also the name of Mr.Gandhi is shown, but nobody has appeared on behalf of respondents. Since the matter is of 1993 I find it proper to proceed with the hearing in accordance with law.

3. Mr.Parikh, Ld.counsel for the petitioner

submitted, interalia, that as such there is good defence on the part of the petitioner in as much as he submitted that towards alleged misappropriation the criminal complaint was filed and also said complaint the police had submitted inquiry report qua the petitioner and it was found in the police inquiry that no misappropriation is not committed by the petitioner but by somebody else. Mr.Parikh submitted that as such the tribunal heard the application for condonation of delay but instead of rendering decision below application for condonation of delay the tribunal without giving opportunity to the petitioner to make submitted on merits decided the appeal itself and has dismissed the appeal. Therefore, he submitted that when before the learned nominee matter has proceeded exparte, may be on account of default committed by the lawyer engaged by the petitioner, but since there was good defence available to the petitioner, this court may consider the matter for remanding the same to the learned nominee instead of directing the matter to be considered by the tribunal upon merits of the appeal. Mr.Parikh relied upon the decision of the Apex Court in the matter of Rafiq and another vs Munshilal and another reported in AIR 1981 SC 1400 for contending that the party should not be made to suffer on account of default on the part of his counsel.

4. Having considered the above and considering the facts and circumstances of the case, it appears that there is no dispute on the point that the petitioner had engaged a lawyer and as per the petitoner it is on account of lapse or default on account of lawyer the matter proceeded exparte before the learned Nominee. There is also no dispute on the point that the written statement was not filed by the petitioner. However, the case of the petitioner is that the application was given by the lawyer of the petitioner but the same is rejected. Be that as it may, but the fact remains that there is default on the part of the petitioner, may be through himself or by his lawyer in defending the suit proceedings before the learned nominee. It is on account of default or lapse on the part of the petitioner, the learned nominee had to proceed exparte and ultiamtely the suit proceedings have been finalised by judgment and award passed by the learned nominee and the learned nominee has awarded amount of Rs.2,43,410.34ps with interest at the rate of 12% p.a. on Rs.1,21,715.11 and therefore it can not be said that there was any error committed by the learned nominee in proceeding exparte against the petitioner. However, in view of the peculiar facts and circumstances brought to the notice of this court that in the proceedings and police inquiry as per

the petitioner it was not found that the petitioner had committed any misappropriation it can be said that there was arguable or good defence on the part of the petitioner in the suit proceedings before the learned nominee. Default is there in the suit proceedings before the learned nominee and therefore even if such default committed by the lawyer of the petitioner is viewed leniently with a view to render justice to the parties, the petitioner can not get away from the liability of compensating for such default to the respondents for remaining negligent. It is account of default or negligence on the part of the petitioner the respondent society is dragged into litigation in the proceedings before the tribunal and also now before this court and therefore even if the default of the lawyer is viewed leniently the petitioner must pay costs of litigation before the tribunal and also before this court for defending the proceedigns by the society. In my view, if the defaulting party is allowed to take benefit by contending that there is good defence, then also without compensating the other side for the cost of litigation, such contention can not be accepted otherwise it would result into encouraging the litigant to apply dilatory tactics and would enable such defaulting party to take undue benefit of its own wrong.

5. Similarly, in the matter where exparte judgment and award while considering the matter for remanding or for setting aside the exparte judgment and award, the court would also keep in mind that it is on account of default by the concerned party, the matter has proceeded exparte and not only that but primafacie the authority, in the present case the learned nominee, has found that the amount is recoverable. Therefore while exercising discretion to interfere with the exparte judgment and award the condition should be imposed on the litigant who has not defended the suit properly to deposit reasonable amount. In my view, if such condition is not imposed, it would also result into encouraging the litigant to apply dilatory tactics and would allow the party to take undue benefit for his own wrong. Therefore, considering the facts and circumstances of the case, I find that the petitioner should deposit 25% of Rs.2,43,410/- with the society even if the matter is considered for retrial of the suit.

6. In view of the aforesaid observations, as it is primafacie found by the court that there is good defence with the petitioner, I find that if the contention of the petitioner is examined for hearing on merits in the appeal proceedings before the tribunal, the consequence

would be that the matter would be required to be remanded to the tribunal, but the tribunal also in the appeal may be required to consider the issue regarding defence in the proceedings of the suit. The present petition is of 1993 and the suit itself is of 1989 and therefore in my view with a to curtail the delay in the proceedings of litigation instead of considering the matter for remanding to the tribunal for rehearing the appeal, it would be more required that the suit itself is directed to be retried by the learned nominee and the matter is considered accordingly. Therefore, I find that in view of the peculiar facts and circumstances of the case, it is not necessary for this court to examine the contention of the petitioner in detail as to whether the tribunal heard the petitioner only on the question of application for condonation of delay or that the petitioner was also heard on merits of the appeal before the tribunal.

7. In view of the aforesaid observations and discussion, in my view the following directions shall meet with the ends of justice:

(i) The petitioner shall pay costs of Rs.2,500/-to the respondent society within a period of one month from today as costs of litigation before the tribunal and before this court for allowing the suit to proceed exparte.

(ii) The petitioner shall deposit amount of 25% of Rs.2,43,410/- within a period of six weeks from today after taking credit of amount which is already deposited by the petitioner pursuant of the interim order passed by the tribunal. So far as the amount of Rs.40,000/- is concerned, the petitioner has submitted that such amount is deposited before this court pending present proceedings. Therefore, the respondent society shall be at liberty to withdraw said amount of Rs.40,000/- from this court but it will remain as deposit with the respondent society and the balance amount shall be deposited by the petitioner as indicated earlier.

(iii) After such amount is deposited the petitioner will be at liberty to move the learned nominee by reporting that the condition of such deposit of 25% with costs is complied with and after such reporting and verification thereof the learned nominee shall proceed with retrial of Lavad Suit No.1781/89 after giving opportunity of hearing to both sides and the learned Nominee shall decide the suit in accordance with law as early as possible preferably within a period of six months from the date of making such application by the

petitioner as indicated earlier.

(iv) It is made clear that if the petitioner fails to deposit said amount and pay costs as indicated earlier, the exparte judgment and award passed by the learned nominee dated 1.4.91 shall operate and if the amount is accordingly paid and deposited by the petitioner, the exparte judgment and award passed by the learned Nominee and its confirmation thereof by the learned tribunal as per judgment dated 6.8.93 shall not operate and shall remain quashed and set aside.

8. Petition is allowed accordingly. Rule is made absolute accordingly.

17.9.03 (JAYANT PATEL,J)